United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1237

TO BE ARGUED BY
CORA T. WALKER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

HARLEM RIVER CONSUMERS COOPERATIVE, INC.,

Plaintiff-Appellant,

DOCKET NO. 74-1237

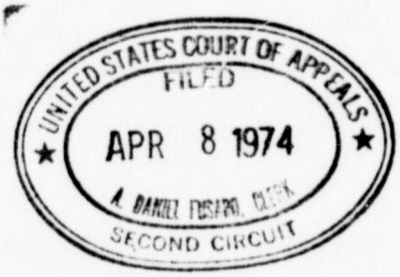
-against-

ASSOCIATED GROCERS OF HARLEM, INC., RETAIL, WHOLESALE & CHAIN STORE FOOD EMPLOYEES UNION, LOCAL 338, ASSOCIATED FOOD STORES, INC., FEDCO FOODS, INC., MID-EASTERN COOPERATIVES, INC., PIONEER FOOD STORES COOPERATIVE, INC., SHOPWELL, INC., SLOAN'S SUPERMARKETS, INC., THEODORE SOLOMON, AARON KAUFMAN, and HARRY ROSENBLUM,

Defendant-Appellees,

- x

REPLY BRIEF FOR PLAINTIFF-APPELLANT, HARLEM RIVER CONSUMERS COOPERATIVE, INC.



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HARLEM RIVER CONSUMER COOPERATIVE, INC.,

Plaintiff-Appellant,

-against-

ASSOCIATED GROCERS OF HARLEM, et al.

Defendant-Appellees.

PRELIMINARY STATEMENT

The Defendant-Appellees', opposition to this Appeal is submitted to this Court in a Joint Brief on behalf of 9 Defendant-Appellees consisting of the Competitors and the Wholesaler-Distributor-Retailers, and a Separate Brief for Defendant-Appellees, Retail-Wholesale and Chain Food Store Employees, Local 338 (hereinafter referred to as Local 338). The Combined Briefs, including a 21 page appendice constitute 123 pages in support of the Order of District Judge Lawrence W. Pierce dated February 7, 1974, as amended February 15, 1974.*

The opposition, in the main focuses its emphasis on Appellees' well planned strategy of its opposition in the Court Below. The Appellees' Briefs fail to respond to (1) the issue

* See unreported opinion of District Judge Lawrence W. Pierce dated February 7, 1974, as amended February 14, 1974, (hereinafter referred to as "Opinion with appropriate page reference)."

of the discriminatory distribution of designated critical National Brand products, the subject of the Appellant's application, (2) irreparable harm to Appellant, or (3) the lack of injury to Appellees upon the granting of the injunction.

Appellees fail to even comment upon, the competitive position between the Competitor-Defendants-Appellees-Sloan's, Shopwell and Fedco and the Appellant, or the anticompetitive effect of the conduct of the unholy alliance, which injure small businesses including minority businesses in blighted areas. Appellees strongly urge this Court to rebuke the Appellant with a severe penalty of double costs and counsel fees for seeking appellate review of the District Court Order.

The Appellee group includes Harry Rosenblum (hereinafter referred to as "Rosenblum") and Theodore Solomon, (hereinafter referred to as "Solomon") who along with Local 338's Business Agent, Linwood Joseph Overton, in June 1972, were convicted of conspiracy and labor-management fraud, for conduct disclosed as a result of the strike which was aegis of this antitrust action, United States of America v. L. Joseph Overton, et al, 470 Fed.2d 761 (2nd Cir. 1972) cert. denied 93 Sup. Ct. 1528 (1973). In addition, Local 338, Associated Grocers of Harlem, Inc., (hereinafter referred to as "AGH") Solomon, Rosenblum and Aaron Kaufman (hereinafter referred to as "Kaufman") are presently enjoined in Harlem River Consumers, Inc. v. Associated Grocers of Harlem, Inc., 450

F.2d 271 (2d Cir. 1971) from directly or indirectly interfering with Appellant's business including obtaining supplies or hiring personnel. Consequently, in the language of the Court below, "...it is pertinent that this proceeding is not being written on an entirely clean slate." (Op. 26).

FACTS SUBMITTED IN OPPOSITION BRIEFS

The major thrust of the Appellees' opposition is addressed to matters raised by them in the Court below on cross-examination, i.e., the non-availability of certain critical items in certain retail food stores, as well as to Appellant; the claim of National economic conditions or inclement weather being the cause of Appellant's massive scratch problems. The Local 338 Brief endeavors to stress how it has adhered to the existing injunctive order issued November 25, 1970.

In so directing the opposition to a reversal, makes it patently clear to Appellant, that Appellees' method of opposition was used to subvert the antitrust issue in this application. The Appellees erroneously contend, that the course of conduct, which was pressed upon the Court below is the issue on this Appeal. First, they argue that Appellant should have pursued or amended its complaint, added new party defendants, and thereafter seek

injunctive relief against these newly added Defendants. (338 Br. 14* and Joint Br. 9**) Appellees in addition thereto, contend on page 8 of their Joint Brief, that Appellant dropped its proceeding against all Defendants-Manufacturers-Suppliers. Appellant's application was never directed against that category of Defendants from its inception. It was the Court below, that directed that they be included at the time it signed the Expedited Notice of Motion, in the application. Appellant's application was addressed to the Defendant-Appellees that are competitors, i.e., Shopwell, Inc., (hereinafter referred to as "Shopwell") Sloan's Supermarkets, Inc., (hereinafter referred to as "Sloan's"); and Fedco Foods, Inc., (hereinafter referred to as "Fedco"); and the Wholesaler-Distributor-Retailers, Associated Food Stores, (hereinafter referred to as "Associated"); Mid-Eastern Cooperatives, Inc., (hereinafter referred to as "Mid-East"); and Pioneer Food Stores, Inc., (hereinafter referred to as "Pioneer").

The Appellant on October 30th, at the initial conference cleared this point up. The presently enjoined Appellees who Appellant alleged were using their union, trade association and political influence were included, i.e., Local 338, AGH, Solomon, Rosenblum and Kaufman. Appellant urged that access to the designated National Brand products, manufactured and distri-

* Reference to Local 338 Brief (herein referred to as "338" Brief" and page number);

** Reference to Joint Brief (herein referred to as "Joint Br." and page number).

buted in the alleged discriminatory method of food brokers to this designated group of Appellees and the interrelationship with these "core" Defendants was the issue. Appellant contended that it did not desire to expand its cause of action or the issues. While the Court below saw fit and did proceed against the designated group of Appellees, it completely lost light of the direction of the Appellant's application.

Thereafter, the course of the hearing mainly created by the Appellees was their use of over-burdening, excessive, duplicative, and an overlapping barrage of cross-examination of Appellant's witnesses. Appellants Question No. 7, of the issues on this Appeal, set forth on page 4, of its Brief is specifically addressed to this point.

The Appellees uniquely and successfully obscured the essential issues during the course of the hearings in the Court below. They endeavor to proceed on that same course of action on this Appeal. They seek to nullify the adjudicated issue of likelihood of success in this antitrust action which is well on its way to trial.

An examination of the Joint Brief of Defendant-Appellees, indicates that 53 of the 75 pages including its 21 page appendices is directed to analyzing items distributed by Met Food Corp., and pursue contentions that the industry shortage is the basis for the Appellant being denied access to National Brand pro-

ducts critical to the operation of its supermarket. The Brief is totally silent as to the issue of the competitive injury to Appellant by its denial of access to these products.

While Appellees place great stress upon the Non-Defendant, Met Food Corp., they fail to mention that it now owns the two Defendant Food Family, Inc., supermarkets. These supermarkets were operated by the Appellee Rosenblum at the commencement of this action in September 1970.* (Tr. 518-522).

In Exhibits 56, 57, 58 and 59, the Food Family Supermarkets on August 24, 1973, were transferred to Met Food Corp. Rosenblum testified that the 8th Avenue store was worth $200,000., and the St. Nicholas Avenue store as a going business is worth $150,000. with the building. (Tr. 533) Consequently the present owner Met Food Corp should be determined a Defendant-Competitor in this action.

POINT I

A MAJOR ISSUE IN THE REVIEW OF ORDER ON APPEAL IS THE EFFECT OF DETERMINATION IN AN EXISTING PRELIMINARY INJUNCTION ORDER, WHERE IRREPARABLE INJURY TO APPELLANT AND NONE TO THE APPELLEES HAS BEEN OBSCURED BY SUBSEQUENT MATTER.

The Joint-Appellees in each of their Briefs make vicious attacks upon the Appellant alleging:

* Reference is to the Transcript of the Hearing on this Motion hereinafter referred to as "Tr." and page number.

"that its brief ignores the law, ignores the District Court proceeding, it discusses irrelevancies, and that Appellant's argument in its brief deteriorates into meaningless citations." (Joint Br.3). Local 338, contends that the application for further injunctive relief is wholly extraneous to allegations in the complaint. (338 Br. 7).

These assertions can only be described as endeavors, to pursue the conduct exhibited at the hearing. Appellees succeeded in having the Court below completely ignore the complaint filed in this antitrust action. It was further overlooked that at the time the previous injunction was granted in this action there was a finding of likelihood of success on the merits in this action. Harlem River Consumers Cooperative, Inc., v. Associated Grocers of Harlem, Inc., et al., Supra.

The Court below held that this application is addressed to complaints that are extraneous to the allegations in the complaint, which alleges a conspiracy to monopolize the Harlem retail food industry for the benefit of the defendant-competitors.

This is the crux of this antitrust action. It would be an injustice to the Appellant at this juncture of this pending antitrust action to have it close its supermarket because it cannot purchase National Brand products.

The Court ignored the complaint, the answers, the previous preliminary injunction proceedings, as well as the present status of the pre-trial discovery proceedings.

338's Brief on page 7, seeks to overcome this error by contending that the District Court in its Opinion on p. 45, footnote 12, adjudicated that issues were beyond the scope of the complaint in this action. 338's Brief, states that the District Court held that there was a serious question as to whether the allegations in the complaint were sufficient to support the application for further injunctive relief and that Appellant's charges were somewhat different violations of the antitrust law.

The law in this case as held by this Court, in The Harlem River case, supra., has been adjudicated already and the complaint in this action has been sustained as establishing a prima facie antitrust action on the merits. On page 22, of Judge Mansfield's unreported opinion it is stated: "We therefore find that plaintiff has demonstrated a substantial likelihood of succeeding on the merits."

Furthermore, the lower Court completely overlooked the fact that paragraph 46, of the complaint set forth allegations of illegal restraint of trade in favor of Plaintiff's Competitors, including members of AGH, and in favor of manufacturers, distributors, wholesalers, jobber food distribution hierarchy in Harlem to the exclusion of cooperative enterprises seeking efficient, low-cost food distribution to the Black and Puerto Rican people of Harlem.

It specifically states:

"...the concerted action of the manufacturer-distributors, is also an attempt to monopolize and is a monopoly in favor of the other competitors of Plaintiff and in particular the members of AGH and an attempt to monopolize a monopoly for the present manufacturer, distributor, wholesaler, jobber, food distribution hierarchy in Harlem; this concerted action of the manufacturer-distributors is a discriminatory practice in favor of the competitors of Plaintiff, including members of defendant AGH, intended to put Plaintiff at a severe economic disadvantage; all of the foregoing is in violation of Sections 1 and 2 of the Sherman Antitrust Act and Sections 2 and 3 of the Clayton Antitrust Act." (Emphasis added)

This Court in affirming the opinion of District Judge Mansfield, in 1971, unquestionably passed upon these allegations as to the Appellees, who are wholesaler-distributors-retailers of National Brand products and Appellant's competitors.

Therefore, the issue now before this Court is whether these allegations in the complaint sufficiently setforths a cause of action as to the antitrust violations alleged in this application in this pending antitrust action. Where Appellant is shown to be suffering irreparable harm, and there is no hardship to the Appellees, is Appellant entitled to further injunctive relief?

Appellant respectfully submits that it is entitled to obtain a further preliminary injunction under Section 16, of the Clayton Act, and Rule 65, of the Federal Rules of Civil Procedure. Hamilton Watch Co., v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953).

This requirement involves a judgment by the Court of the Appellant's chances of success in his suit on the merits. As Judge Frank stated in the Hamilton Watch Co. (supra) case:

> "The possibility that the Court may decide the right to permanent relief adversely to Plaintiff does not preclude it from granting the temporary relief."

The Court below is evidently holding that this constitutes a requirement of likelihood of success on every issue in the complaint. (Op. 35 footnote 12).

In Briggs Mfg. Co. v. Crane Co. 185 Fed. Supp. 177 (E.D. Mich. 1960) a preliminary injunction was granted even where the Court stated that:

> "We cannot determine at this juncture...whether or not (Plaintiff) is entitled to the ultimate relief which it seeked."

In Kay Instrument Sales Co. v. Holdex Alkeibolag, 269 Fed. Supp. 578 (S.D.N.Y. 1968) the Court citing the Hamilton Watch case said:

> "A preliminary injunction ought to be issued if Plaintiffs carry the burden to show that...there are serious questions going to the merits sufficient to make them a fair ground for litigation and thus for more deliberate investigation." Hamilton Watch Co. v. Benrus Watch Co. 206 Fed. 2d 738 (2d Cir. 1953), cited with approval Unicorn Management Corp. v. Kroper Co., 366 Fed. 2d 199, 204-205 (2d Cir. 1966).

For irreparable injury to exist, some Courts have stated that it is necessary for the Plaintiff to establish that the loss or damage is not capable of definite measurement. However, no Court

would deny an otherwise valid preliminary injunction, in a case where the Plaintiff is in danger of being completely forced out of business no matter how accurately the net worth and further profits of that business could be calculated. As stated in Bateman v. Ford Motor Co., 302 Fed. 2d 63 (3rd Cir. 1962).

> "To make the remedy provided by the statute effective in accomplishing what is meant to be accomplished, we think that the (Plaintiff)... needs equity help in keeping his business going and a money judgment years after his franchise has been taken away and his business obliterated is small consolation..."

In Bergen Drug v. Park Davis & Co., 307 Fed. 2d 725 (3rd Cir. 1962) Plaintiff alleged that if a preliminary injunction was not granted it could not successfully prosecute the main claim under the antitrust laws. The Court in granting the preliminary injunction stated:

> "The point Plaintiff convincingly makes is that it will be unable to secure the cooperation of other witnesses because they fear the same sought of retaliatory action that Plaintiff has experienced. Certainly, a Court can act where a party's conduct is calculated to frustrate ligation."

In case at Bar, while it is true that from paragrpah 26(a) of the complaint Plaintiff's damages are calcuable in dollars and cents, that certainly does not mean or indicate that the injury to its goodwill, National prominence as a self-help project, the reputation of its Board members, shareholders, employees, or the integrity of the Harlem community can be repaired or replaced by any amount of money.

If Appellant's fair share of these National Brand products are not made accessible to it, Appellant will be forced out-of-business, and thus foreclose to the poor consumers of the Harlem community wholesome food, and good services at fair prices.

Plaintiff's supermarket has afforded Blacks throughout the United States of America an opportunity to enhance their pride and dignity and reaffirm their faith in the democratic system. How many dollars and cents can replace this?

As in Bergen Drug Co., V. Park Davis & Co., (supra), if further injunctive relief in this case is not granted it is highly probable that faith and confidence in the Federal Judicial System will be seriously impaired and the Black man on the street will seek extra-legal remedies when confronted with unjust acts as have confronted the Appellant.

POINT II

THERE IS SUFFICIENT EVIDENCE AS TO THE INTER-RELATIONSHIP BETWEEN THE APPELLEES TO INFER CONSPIRATORIAL CONDUCT

Appellees interdependently contend at 338 Br. 12 and Joint Br. 4 that Appellant was permitted to wander freely and at random through massive documents produced by Met Food Corp., but it did not provide a scrap of evidence of discrimination or conspiracy. Met only produced in-

voices of 10 stores, none of which were of the size and volume of the Appellant's or the Competitor Appellees' supermarkets. See Exhibits 131 through 131, O. The Competitor-Appellees and the Appellant are in fact in competition with each other, not these stores. Appellant's submission on November 21, 1973 at the Court documented the interrelationship between those Met customers AGH, Associated and Solomon and are Local 338 stores.

The Appellees nevertheless seek to claim and allege that there is no connection between them and the conspiracy against the Appellant, which manifested itself with the now enjoined "strike." Moe Steinman, an executive of Defendant Shopwell at (Tr.2687-2691) pleaded the Fifth Amendment when asked about the "strike." Appellant was foreclosed from ascertaining any information as to his relationship and connection with unions. (Tr. 2686). When questioned as to his duties as director of labor relations. The Transcript indicates:

"MR. ABRAMOWITZ: Your Honor, the witness is presently under investigation both in the District Attorney's Office for the County of New York and the Federal Strike Force for, among other things, all his relationships with the unions that he deals with in his capacity as director of labor relations. Once he says that he is the director of labor relations and you ask him his duties, that opens up the door toward further questions about his contacts with unions."

For the Court's information, I have instructed the witness that any questions relating to unions, to Iowa Beef or to Trans World Fabricators and the three pending indictments against Mr. Steinman -- those are the questions I have told him to invoke his privilege.

THE COURT: All right, Thank you."

* * * *

"Q. In the course of carrying out your duties as director of labor relations, have you come in contact with Julius Sum, the former president of Local 338?

A. I would take the Fifth Amendment on that question." (Tr. 2687-8). At Tr. 2691 it states:

"Q Do your duties have anything to do with the store managers or assistant store managers of Supermarkets and their inclusion or exclusion from the Local 338 union contract?

A. I take the Fifth Amendment on that.

Q. Did it come to your attention, the labor dispute of the plaintiff, with Local 338?

A. I take the Fifth Amendment on that."

A review of the previous preliminary injunction proceedings in the Harlem River case, supra. that it was the inclusion of Appellant's store manager and assistant store managers that was the crux of the alleged "labor dispute."

The representation in the 338's Opposing Brief at p. 46, of only casual mention of it during the hearing in the Court below is simply untrue. The testimony of Steinman, evidences that

at the time of the hearing, that there was in fact some possible unrevealed relationship between the presently enjoined Local 338, involving the strike against the Appellant. Local 338 cannot contend that this relationship with Shopwell is immune from the antitrust laws. This issue has already been determined by this Court in the earlier appeal and decision.

Local 338, in its Brief professes, that it has not since the entry of the Order of Judge Mansfield, engaged in any conduct violative of that Order, or was engaged in any conduct harmful to Appellant. That is likewise untrue. The Appellees in the course of their disruptive conduct during the hearing in the Court below, sought to claim and prove that Appellant's financial problems were the result of mismanagement.

But, the testimony of Harold Dolly, Robert Nall, and Venus Harris, Appellant's witnesses and consultant Robert Higgins, prove Appellant's claim to the contrary, as setforth in the Venus Harris affidavit of October 24, 1973. It proved that there had been interference with the Appellant's personnel, and some were now Local 338 members. The evidence adduced at the hearing, proved that after Appellant trained personnel in management skills to be part of a management team, these employees thereafter disappeared, and later turned-up as the employees of Appellee-Sloan and members of Local 338. (Tr. 1677, 1675)

At page 29 of the Opinion, Local 338, is admitted to have collective bargaining agreements with most of the retail operations involved in this proceeding. The 338 Br. 5 concedes it has collective bargaining agreements with Shopwell, Sloan's, Fedco and Kaufman. It omitted stating that it also has collective bargaining agreements with AGH, Associated, Pioneer, the Met Food Stores, and the stores serviced by Mid-East, which are managed by its inter-related organization, Federation of Cooperatives, Inc., with which it has interlocking Directors. It further omitted that Pioneer and Associated Stores in Harlem are covered by the AGH collective bargaining agreement negotiated by Solomon.

The Appellees, devote over 50% of their Briefs, seeking to allege, that the Appellant in essence did not seek clear relief and changed its position at various stages. This representation is indicia of the maneuverings and manipulations of the Appellees. The Appellant's application, at the outset was addressed to the Defendant-Competitors, and the Defendants-Wholesalers-Distributors-Retailers, who are Appellees before this Court. (Reply Brief p. 3-5) Appellant has not changed its position, and the Appellees have not changed their defensive strategy -- attempt to create confusion.

This is evidenced by, Local 338's Brief on page 10, and the Joint Brief in page 10. Although claiming to act independently they have functioned and continue to function inter-

dependently. For example, examine Appellees Briefs as to their reliance upon Venus Harris, and Glen Glenn affidavits executed on October 24, 1973, as to Met's delivery of the critical items, i.e., Mott's Applesauce, rice, tunafish and tomatoe products. Appellant claimed non-delivery during eight prior weeks. Since the preparation of 13 pages of affidavits with 20 pages of attached Exhibits, obviously follows days of legal drafting and preparation in a lawyer's office, and execution is the final step, what do Appellees' purport to prove? Appellant obviously had no knowledge of what portion of an order placed 4 days prior was actually being delivered.

This proves that on October 24, 1973, Met had some knowledge, as to the commencement of this proceeding. Furthermore, the sudden availability of previously"scratched" items, defies the Court's finding that Appellant's shortages from Met were endemic in the industry and due to inclement weather. The truth and veracity of the Appellees' claim on behalf of Met is crushed.

Met's claim as setforth in Appellant's papers and on its direct case, was with respect to credit. Ricci of Met Food testified as to same. (TR. 1157-1156, 1182-1185, 1188 and 1212-1214). He testified as to the interrelationship between AGH, and the Met Food Co-op stores. (TR. 1189-1206) He testified as to his seeking to obtain a collateral security agreement from Appellant. (Tr. 1161-1164, Exhibit 61, and Exhibit 60, for identification)

POINT III

THE COURT BELOW ALLOWED THE APPELLEES TO INTERJECT EXTRANEOUS ISSUES, THAT DISRUPTED APPELLANT'S PRESENTATION OF ITS EVIDENCE, AND APPELLEES DID OBSTRUCT AND IMPEDE THE ADMINISTRATION OF JUSTICE IN THIS ACTION DUE APPELLANT'S LOW-INCOME CONSUMER SHAREHOLDERS

Appellant is seeking continued access, availability and the right to purchase critical National Brand products, while this antitrust action which has been pending for three years is awaiting trial. At the hearing, the Appellees on cross-examination, ran rampantly through Appellant's bank records, cancelled checks, etc., in pursuit of evidence to support a claim as to Appellant's financial condition being the cause of its shortages. When that failed, the extended and over-burdensome cross-examination on newly interjected matter was a travesty upon our system of justice.

An examination of the Trial Records, show that Appellees in their opposing briefs have distorted the facts, and their presentation. It is consistent with a pattern and plan of subterfuge and confusion. The Appellees had a prepared plan of defense to totally misguide and misdirect the hearing, and one which would further delay a final determination of the issues in a jury trial of this case.

Notice if you will, that on October 30, 1973, Appellees contended that Appellant's redress to the shortage of critical National Brand products was in essence to start this antitrust action all over again, with new issues, new parties, new interroga-

tories, new responses, new oral depositions, new requests for rulings on objections. This failed when Appellant's counsel steadfastly pleaded that it did not desire to expand this action, it merely sought further injunctive relief in keeping with Judge Mansfield's November 25, 1970 order, paragraphs 1(D) and 1(E).

The Appellees abuse of the hearing process, on Appellant's properly directed application for further injunctive relief is highlighted by their present contention. For example:

1. Much of their argument is their claim, that they agreed to limit their cross-examination. But, an analysis of what took place indicates that, Appellees' subjected Appellant's witness, Harold Dolly who had 65 pages of direct examination to 248 pages of cross-examination; Venus Harris, who had 163 pages of direct examination, to 395 pages of cross-examination; Fred Ricci who had 59 pages of direct examination to 183 pages of cross-examination; Julius Rose, who had 45 pages of direct examination to 115 pages of cross-examination.

2. The Appellees in conducting that cross-examination seized and was given the opportunity to pursue new matters which they interjected at will. They abused and obstructed the entire hearing. A classic example is the cross-examination of Venus Harris;

(a) Mid-East went into Appellant's personnel and employment records including time cards, computer payroll records, payroll check register, from period beginning August, 1972, up to November 1, 1973, work schedules, etc.

(b) Mid-East and Shopwell's attempt to discredit Venus Harris as to paragraph 24 of her affidavit. (338's Br. p. 10 and Joint Br. pp. 20-22). On page 1704, and 1706, of the Transcript the witness clearly explained her statement;

(c) Local 338 cross-examination of Venus Harris to distort the facts and mislead the Court, i.e., basement storage of merchandise. (Tr. 1693-1695); the irrelevant analysis of "scratched" items ;

(d) Mid-East's cross-examination in regard to Appellant's lack of management skills.

On the other hand, when Appellant sought to offer proof as to its endeavor to obtain managers, and its numerous problems to obtain management skills, the Court sustained the objection of Appellees' counsel, on the issue. That is demonstrated as Exhibits 102 and 103 marked for Identification (Tr. 1668) and (Tr. 1673). Appellant developed in (Tr. 1677-1679) that its estranged personnel went to Appellee Sloan's, and had joined Local 338 (Tr. 1700-1701).

The Appellees on cross-examination went into areas of Appellant's payments to its legal counsel, membership of its Board of Directors, stockholder membership, its involvement in a non-profit housing project, a June 1972, newspaper article as to Appellant's plan for expansion and abused the judicial process.

Appellee Shopwell's Exhibit A (42 Met Food Corp. Cost Plus Books, constituted a planned cover-up. The credability of these documents were destroyed when expert witness Blythe testified (Tr. 787-780). Appellees seek to contend they represent the cost book demanded by Appellant is Exhibit 60 for Identification.

The interdependence is evident by the comparison of the testimony of Appellees officers or employees, i.e. Anastasia, Gimson, Unterberg, Tarr. Kaufman, and Bromberg--as well as Maidenbaum. No one communicated or spoke to each other, but they all acted alike.

In Volume 42, Issue 2 of the American Bar Association, Section of Antitrust Law Journal (1973), on conscious parallelism and the implied conspiracy doctrine at 289 states:

> "Horozontal concerted boycotts may take the form of sellers or buyers conspiring or combining in a common course of restrictive dealing arrangements enforced through their collective refusals to deal with those of their respective customers or suppliers who do not comply with their pre-announced policies. Such conspiracies, long held per se illegal, 'are seldom capable of proof by direct testimony, and may be inferred from the things actually done.' Eastern States Lumber Assn. v. United States, 234 U.S. 600, 612 (1914)."

It further states at 291:

> "Under the theory of monopolistic competition, a market comprised of just a few sellers (oligopoly), or a few buyers (oligopsony), may behave anti-competitively without any 'agreement' in the same manner as a conspiracy. Each member of the small group of competitors know that his conduct will not go unnoticed by the others.... As a consequence, interdependently consciously parallel behavior, such as parallel refusals to deal, may result without any communication, understanding or agreement between the parties."

The District Court erred in holding that there was a insufficient showing of an implied conspiracy based upon the evidence adduced.

POINT IV

APPELLANT'S APPLICATION FOR INJUNCTIVE RELIEF DEALT WITH THE DISCRIMINATORY PRACTICE FOR AVAILABILITY OF CRITICAL NATIONAL BRAND PRODUCTS WHICH EFFECT FREE AND OPEN COMPETITION, BETWEEN APPELLANT AND THE COMPETITOR-APPELLEES AND THE WHOLESALER-DISTRIBUTOR-RETAILERS' STORES THAT ARE LOCATED WITHIN THE HARLEM COMMUNITY.

Local 338 pursues the Appellees contention as to the Appellant's alleged "new theories" under Robinson-Patman Act. Appellee-Competitors are able to obtain merchandise directly from National Brand manufacturers, and this is set forth in Appellant's moving papers.

General Foods' witness Shepard provided proof of the industry policy of requiring at least 3 retail stores, a warehourse and dealing through a food broker (Tr.2269-2274, and 2271). He testified that Appellees Sloan's, Shopwell, Pioneer, Associated, Fedco, and Mid-East were General Foods customers who dealt through the same food broker. Met is also. (Tr.2258-2260).

Collins of Riviana Foods (Carolina Rice) provided proof of the customer-relationship with Appellees Sloan's, Shopwell, Fedco, Associated, Pioneer, and Mid-East. Met is also. (Tr. 2639-2641). He stated unequivocally that any testimony as to shortage due to weather or rice crop would not have resulted in one independent supermarket being without product

consistently for 8 weeks. (Tr. 2660-2661). He testified that they were never completely out of product (Tr. 2648), and a "slight delay of a week or two" (Tr. 2446 and 2647).

The Court below erred in sustaining Appellee Shopwell's objection as to inquiry into its food broker relationships (Tr. 2016-2033). The essence of the Appellant's application was access to direct buying, its effect and competitive injury. The Court barred inquiry into possible illegal combinations with third parties and any connection so as to challenge refusals and illegal agreements. If Appellant can meet the minimum purchase requirements, and is competitively injured by denial of right to purchase because of the at least 3 retail stores and a warehouse provision made with Appellees and food broker and unions, that is an illegal restraint of trade.

The Court overlooked the strong inference of the interlocking relationship of Shopwell's involvement in the "strike" against Appellant, the subject of the first injunction. Shopwell's executive Moe Steinman, pleaded the Fifth Amendment when interrogated, as to his involvement with L. Joseph Overton, Local 338, unions, store managers or assistant store managers inclusions in Local 338 union contract, and labor dispute between plaintiff (Appellant) with Local 338. (Tr.2688, 2689, 2691).

It is apparent that the food broker arrangement could be used for an "unlawful purpose", and found to be used to aid and abet illegal restraints of trade alleged in the complaint. (Tr. 374, 2269-2272).

The prime member of the enjoined Appellees Local 338 at 26 of its Brief alleges that competitive injury to Appellant through violations of Robinson-Patman cannot be considered in this proceeding because: (a) the manufacturers of the dry goods referred to during the hearing are not defendants in this action; and (b) that there is no allegation in the complaint which directly or indirectly refers to them.

The complaint in par. 5(a) alleges Plaintiff's purpose to sell quality food at prices at least equal to prices charged for similar goods in other areas with non-black population; par 7(a) includes corporations engaged in the business of manufacturing, processing, distributing and selling food in interstate; par. 7(b) includes competitors selling food at retail in Harlem; and par. 24 alleges Plaintiff's plan to establish a number of cooperative stores to retail all kinds of food products including but not limited to...canned goods, cereals...flours ...paper goods.

Is it Local 338's argument that those allegations as to a plan to monopolize or attempt to monopolize and illegally restrain trade as to supermarkets are insufficient to enjoin acts alleged as violations of Secs. 1, 2, and 3 of the Clayton Act (15 U.S.C. sec. 12, 13 and 14) particularly when Sec. 2 as amended covers Robinson-Patman Act Sec. 2? The critical supermarket items being discriminatorly distributed, as between Appellant and the Appellee-Competitors are certainly canned goods, cereals, flours, and paper goods. They are within the scope of the allegations of the complaint.

Likewise, Local 338's argument and reference to Klein v. Lionel Corp., 138 F. Supp. 560 (D. Del.), aff'd, 237 F. 2d 13 (3d Cir. 1956) is inapplicable. (338 Br. 39-41). Appellant is not seeking damages against any non-defendant manufacturer of dry grocery products. It seeks to enjoin Local 338 and the Appellees use of their product distribution in violation of these antitrust laws, to the detriment of free and open competition, pending the outcome of this action against the defendants. It is against discriminatory servicing between competitors, for the benefit of Local 338, who is the prime enjoined Appellee. It concerns access to product not price of product.

In Perkins v. Standard Oil, 395 U.S. 642 (1969), the Supreme Court held that the competitive entry provision of Section 2(a), of the Sherman Act applied to all purchases of seller's products and products of intervening distribution. The Court refers to F.T.C. v. Fred Meyer, 390 U.S. 341 (1968), observing that Sections 2(a) and 2(d) are closely "analagous" and there was no basis in the purpose of the act to read "customer" more narrowly in 2(a) than 2(d). See also National Dairy Corp. v. F.T.C., 412 F. 2d 605, (7th Cir. 1969).

Consequently the Fred Meyer Guides as to Sections 2(d) and 2(e) of Robinson-Patman Act apply where a seller (the manufacturer of National Brand products) pay for services or facilities furnished by a customer in connection with the distribution of his products.

Where competitive injury is shown, when Appellant can meet the minimum case requirements, the discriminatory

requirement of at least 3 retail stores and a warehouse, which favors Appellee-Competitors, it should be enjoined.

This Court can take judicial notice that in Vol. 171, No. 57 of the New York Law Journal dated March 25, 1974, p. 1, cols. 4-5, the Federal Trade Commission announced expansion of investigation of possible antitrust violations through... "efforts to 'corner' scarce supplies of certain products...or other anticompetitive activities directed against small businessess..." It will also concern itself with anticompetitive conduct inhibiting a small business including minority businessess and businesses in blighted areas.

Discriminatory distribution practices of even the scarce items such as rice was proven through testimony of Mid-East witness Gimson. (Tr. 394-398).

The Court below erred in relying upon a manufacturer's notice as to rice price increase, and a New York Times, February 4, 1974, sec. 1, p. 25, col. 1 article (again as to rice), to support a determination, that Appellant's inability to obtain products was due to a national economic food condition and inclement weather.

The Appellant, as owners and operators of the only Black owned supermarket in Harlem, cannot be denied the same legal rights as its competitors, to purchase critical National Brand products, i.e. Del Monte canned goods, Gold Medal Flour, Pillsbury products, Libby's, Motts Apple products, Domino Sugar, Kelloggs, Bumble Bee, etc.

The Transcript of the hearing does evidence that the Appellees did interject extraneous issues, disrupt Appellant's presentation of its evidence, and obstructed and impeded the administration of justice in this proceeding, that was due Appellant's 4,500 low-income shareholders, who are struggling to provide themselves with quality food at a lower price.

CONCLUSION

THE DISMISSAL OF THE APPELLANT'S APPLICATION FOR FURTHER INTERIM INJUNCTIVE RELIEF AT THE END OF THE APPELLANT'S DIRECT CASE WAS IMPROVIDENTLY GRANTED BY THE COURT BELOW.

Appellant has raised questions going to the merits so serious, substantial, and the balance of hardships tip decidely in its favor, and there is none to the Appellees, that the application for interim injunctive relief, in furtherance of the injunction granted in November 1970 should be granted with costs and disbursements.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

PATRICIA HARRISON, being duly sworn deposes and says:

That Deponent is not a party to the action, is over 18 years of age. That on the 6th day of April, 1974, Deponent served the with Reply Brief of Plaintiff-Appellant upon Rosenman, Colin, Kaye, Petschek & Emil; Guggenheimer & Untermyer; Roberto Lebron; Bernard J. Ferguson; Farber, Raucher & Goldberg; Unterberg, Bandler & Goldstein; Berger, Kramer & Levenson; and Sirota & Kurta, Esqs; the Attorneys for the Defendant-Appellees in this action, at 575 Madison Avenue, New York, N.Y., 10022; 80 Pine Street, New York, N.Y.,10005; 349 East 149th Street, Bronx, New York, 10451; 60-10 Roosevelt Avenue, Woodside, N.Y., 11377; 8 West 40th Street, New York, N.Y., 10018; 275 Madison Avenue, New York, N.Y., 10016; 377 Broadway, New York, N.Y., 10013; and 401 Broadway, New York N.Y., 10013; the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

Patricia Harrison
PATRICIA HARRISON

Sworn to before me this
6th day of April, 1974

CORA T. WALKER
Notary Public, State of New York
No. 31-4130450
Qualified in New York County
Term Expires March 30, 1975